NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

DAVID FERWERDA, **Plaintiff** **vs.** **LEOPOLD & ASSOCIATES PLLC; GCA MANAGEMENT SERVICES 2015-13 LLC; MTGLQ INVESTORS, L.P.; RUSHMORE LOAN MANAGEMENT SERVICES; JOHN DOES I-X,** **Defendants.**	Civ. No. 16-1169 **MEMORANDUM OPINION and ORDER**

KEVIN MCNULTY, U.S.D.J.:

This matter comes before the Court on the motion of defendants GCAT Management Services 2015-13 LLC, MTGLQ Investors, L.P., and Rushmore Loan Management Services[1] to dismiss the Complaint for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6). (ECF no. 14) For the reasons stated herein, the motion will be denied. Defendants suggest many legal and factual defenses that can or will be asserted, but these must await summary judgment or trial.

Standard

The *Twombly/Iqbal* standards governing a Rule 12(b)(6) motion to dismiss a complaint for failure to state a claim upon which relief may be

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1 "Defendants" as used herein shall refer to these three. By stipulation and order, plaintiff has dismissed all claims against defendant Leopold & Associates PLLC. (ECF no. 25) The discussion in this opinion therefore ignores allegations against Leopold.

granted are by now familiar. The defendant, as the moving party, bears the burden of showing that no claim has been stated. *Animal Science Products, Inc. v. China Minmetals Corp.*, 654 F.3d 462, 469 n. 9 (3d Cir. 2011). For the purposes of a motion to dismiss, the facts alleged in the complaint are accepted as true and all reasonable inferences are drawn in favor of the plaintiff. *New Jersey Carpenters & the Trustees Thereof v. Tishman Const. Corp. of New Jersey*, 760 F.3d 297, 302 (3d Cir. 2014).

A short and plain statement of plaintiff's entitlement to relief will do. *See* Fed. R. Civ. P. 8(a). Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id.* at 570; *see also West Run Student Housing Assocs., LLC v. Huntington Nat. Bank*, 712 F.3d 165, 169 (3d Cir. 2013). That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678.

The Complaint

The allegations of the complaint, which are assumed to be true for purposes of this motion, are as follows.

The plaintiff, David Ferwerda, is the owner of a home in Montvale. In 2007 he entered into a refinancing transaction, consisting of a promissory note, secured by a mortgage on the home. He defaulted on the mortgage in 2009. (Cplt. ¶¶ 8–12)

The motion papers refer to a 2009 petition in bankruptcy, but this is not alleged in the complaint.

A New Jersey state court "debt collection action", Docket no. F-5166-10, followed. Ferwerda was represented in that foreclosure action by Denbeaux & Denbeaux. On May 22, 2014, the Federal Home Loan Mortgage Corporation ("Freddie Mac") obtained a final judgment of foreclosure in the amount of $291,952.18. (Cplt. ¶¶ 13–19)

On June 24, 2015, Wells Fargo Bank, N.A., executed an assignment of the mortgage to defendant GCAT Management Services 2015-13 LLC. On May 15, 2015 (out of order, say defendants), GCAT executed an assignment of mortgage to defendant MTGLQ Investors, L.P. (Cplt. ¶¶ 29–32)

In August 2015 servicing of the loan was transferred from Wells Fargo Home Mortgage to defendant Rushmore Loan Management Services, LLC. Rushmore sent monthly loan statements, with interest in the amount of $1143.57, escrow payments of $339.55, and other fees and charges. (Cplt. ¶¶ 20–26)

Count I alleges a violation of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, against defendant Rushmore. The allegation is based on the August 2015 letters announcing the transfer of servicing to Rushmore, as well as the monthly loan statements sent by Rushmore thereafter. As of March 1, 2016, the statements had demanded approximately $38,621.50 in excess of what was owed on the final judgment of foreclosure. (Cplt. ¶¶ 46–50) The letters and monthly statements as well as a phone call from Rushmore allegedly violated FDCPA because they were directed to Ferwerda, when he was still represented by counsel. (Cplt. ¶ 51) *See* 15 U.S.C. § 1692c. In addition, the statements sent by Rushmore were allegedly misleading in that they sought payments Rushmore was not then entitled to collect, and which were not included in the final judgment. (Cplt. ¶ 52) *See* 15 U.S.C. § 1692e. The means employed by Rushmore were allegedly unfair and unconscionable in that Rushmore sought to collect amounts not owed. (Cplt. ¶ 53) *See* 15 U.S.C. § 1692f. Finally, Rushmore failed to disclose within 5 days of its initial communication with Ferwerda the amount of the debt, the name of the creditor, and Ferwerda's right to dispute it within 30 days and obtain documentation. (Cplt. ¶ 54) *See* 15 U.S.C. § 1692g.

Count II alleges a violation of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1641(g) (Liability of assignees), against defendants GCAT and MTGLQ. Within 30 days of execution of the June 24, 2015 assignment of mortgage, GCA was allegedly obligated to, but did not, issue a written disclosure to Ferwerda. Within 30 days of execution of the May 15, 2015 assignment of mortgage, MTGLQ was allegedly obligated to, but did not, issue a written disclosure to Ferwerda. (Cplt. ¶¶ 68, 69)

Statutes Cited

The sections of the FDCPA cited in Count I provide as follows:

> (a) Communication with the consumer generally
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> Without the prior consent of the consumer given directly to the debt collector or the express permission of a court of competent jurisdiction, a debt collector may not communicate with a consumer in connection with the collection of any debt-- ....
>
> (2) if the debt collector knows the consumer is represented by an attorney with respect to such debt and has knowledge of, or can readily ascertain, such attorney's name and address, unless the attorney fails to respond within a reasonable period of time to a communication from the debt collector or unless the attorney consents to direct communication with the consumer....

15 U.S.C. § 1692c.

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: ....
>
> (2) The false representation of--

> (A) the character, amount, or legal status of any debt ....

15 U.S.C. § 1692e.

> A debt collector may not use unfair or unconscionable means to collect or attempt to collect any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> (1) The collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law....

15 U.S.C. § 1692f.

> (a) Notice of debt; contents
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> Within five days after the initial communication with a consumer in connection with the collection of any debt, a debt collector shall, unless the following information is contained in the initial communication or the consumer has paid the debt, send the consumer a written notice containing--
>
> (1) the amount of the debt;
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> (2) the name of the creditor to whom the debt is owed;
>
> (3) a statement that unless the consumer, within thirty days after receipt of the notice, disputes the validity of the debt, or any portion thereof, the debt will be assumed to be valid by the debt collector;
>
> (4) a statement that if the consumer notifies the debt collector in writing within the thirty-day period that the debt, or any portion thereof, is disputed, the debt collector will obtain verification of the debt or a copy of a judgment against the consumer and a copy of such verification or judgment will be mailed to the consumer by the debt collector; and
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> (5) a statement that, upon the consumer's written request within the thirty-day period, the debt collector will provide the consumer with the name and address of the original creditor, if different from the current creditor.

15 U.S.C. § 1692g.

TILA, cited in Count II, provides as follows:

> (g) Notice of new creditor
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> (1) In general
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> In addition to other disclosures required by this subchapter, not later than 30 days after the date on which a mortgage loan is sold or otherwise transferred or assigned to a third party, the creditor that is the new owner or assignee of the debt shall notify the borrower in writing of such transfer, including--
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> (A) the identity, address, telephone number of the new creditor;
>
> (B) the date of transfer;
>
> (C) how to reach an agent or party having authority to act on behalf of the new creditor;
>
> (D) the location of the place where transfer of ownership of the debt is recorded; and
>
> (E) any other relevant information regarding the new creditor.

15 U.S.C. § 1641(g).

Analysis

Count I adequately alleges the elements of a violation of the FDCPA. And it alleges factually, for example, that Rushmore demanded amounts in excess of what was owed, and that it contacted Ferwerda directly at a time that he was represented by an attorney.

Rushmore has much to say in response. At least one of the letters, it says, was simply a required notification of the change in mortgage servicer; it was not a communication to collect a debt. Rushmore offers that the debt had been discharged in bankruptcy and that therefore the correspondence could not have been an attempt to collect a debt. It points to a boilerplate disclaimer in the monthly statements stating that *if* the debt is discharged, the letter should not be regarded as an attempt to collect a debt. I find the reasoning somewhat circular, but set that aside. The factual context, and what it implies about Rushmore's motivations or the manner in which the letter would have been interpreted, surpass the bounds of a 12(b)(6) analysis. That still leaves the monthly statements, however; the complaint alleges that these were, in effect, bills for amounts that were not owed. Whether that is true must await factual development, but it is alleged.

Similarly, Rushmore says that it could not have known that Ferwerda was still represented by counsel, since the litigation had ended. Once again, that is a factual contention that cannot be settled on a motion to dismiss. Rushmore's contentions about the scope of a bankruptcy discharge and the extent to which it precludes the current claims, too, rely on matters extrinsic to the complaint.

Count II adequately alleges the elements of a violation of TILA's "notice of new creditor" provisions. The debt allegedly was assigned and transferred without the requisite notice being timely transmitted to Ferwerda.

Here, too, MTGLQ and GCAT have much to say in response. They say, for example, that the dates of the assignments should not be controlling; indeed they appear on their face to have been executed out of order. The controlling dates, they say, should be those of the underlying purchase agreements by which the loan was actually transferred. It proffers those agreements in evidence. Once the dates are properly aligned, say defendants, it should be clear that their disclosure obligations never arose, because the 30 day grace period of Regulation Z applies.[2] I do not consider these agreements, which are extrinsic to the complaint and require a factual context.

As to both Count I and Count II, defendants proffer matters that can be settled on a motion to dismiss; they depend on facts outside the pleadings. If, as defendants state, these defensive allegations are true, and if, as they imply,

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2 *See* 12 C.F.R. § 226.39(c)(1) (covered person not subject to notice requirement if the person "sells, or otherwise transfers or assigns legal title to the mortgage loan on or before the 30th calendar day following the date that the covered person acquired the mortgage loan")

they were well known to plaintiffs when they filed their complaint, the court will deal with the situation appropriately. But we are ahead of ourselves. For now, it is sufficient to state that the Rule 12(b)(6) motion must be denied.

ORDER

This matter having come before the Court on the motion of defendants GCAT Management Services 2015-13 LLC, MTGLQ Investors, L.P., and Rushmore Loan Management Services to dismiss the Complaint for failure to state a claim, pursuant to Fed. R. Civ. P. 12(b)(6) (ECF no. 14); and the plaintiff having submitted a response (ECF no. 20); and the defendants having submitted a reply (ECF no. 21); and the Court having considered the matter without oral argument, pursuant to Rule 78, Fed. R. Civ. P.; for the reasons expressed above, and good cause appearing therefor;

IT IS this 6th day of December, 2016,

ORDERED that the motion to dismiss (ECF nos. 14) is DENIED.

Hon. Kevin McNulty
United States District Judge